

FILED

DECEMBER 29, 2009

**NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS**

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS
OAL DOCKET NO.: BDS 10088-05

IN THE MATTER OF THE SUSPENSION	:	Administrative Action
OR REVOCATION OF THE LICENSE OF	:	
	:	
SURENDRA SHETH, M.D.	:	FINAL DECISION AND ORDER
LICENSE NO.: MA03027000	:	
	:	
TO PRACTICE MEDICINE AND SURGERY	:	
IN THE STATE OF NEW JERSEY	:	
	:	

This matter commenced with the filing of a Complaint by the Attorney General of New Jersey against the respondent, Surendra Sheth, M.D., on July 11, 2005. The Complaint alleged in Count I that respondent's treatment of patient J.S. constituted gross and/or repeated acts of negligence, malpractice, or incompetence with respect to a rare metabolic disorder which J.S. had, Carnitine Transport Defect¹ ("CTD"), and that respondent committed violations of record keeping regulations.² Respondent treated J.S. from April

¹ CTD is a chronic disorder caused by a genetic abnormality and is characterized by a reduced level of the amino acid carnitine. It can be detected and diagnosed as early as birth, with physical manifestations developing as a child grows. CTD affects the body's energy metabolism system in that it causes problems with fatty acid oxidation, forcing the body to rely exclusively on glucose for energy and preventing the breakdown of fat for energy, leading to hypoglycemia.

² The Complaint alleged six counts of misconduct on the part of respondent. Ultimately, the Attorney General proceeded against respondent on Count I only, regarding patient J.S. Count II through Count IV alleged that respondent's conduct constituted acts of gross and/or repeated negligence, malpractice, or incompetence, and that respondent committed record keeping

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9, 1987, when J.S. was two weeks old, until J.S. died suddenly in May 2000 at the age of thirteen. The Complaint alleged that after J.S. was diagnosed with CTD, respondent undertook the management of J.S.'s treatment with inadequate knowledge and experience, that respondent failed to consult with any of the readily available experts on CTD, that respondent inappropriately decreased the prescription of carnitine supplements recommended by a specialist, and that respondent improperly monitored the child's growth, development, and condition. The Complaint further alleged that respondent maintained inadequate treatment records for J.S. by failing to document that J.S. suffered from CTD, failed to document the findings of several exams, failed to maintain an adequate growth chart, and failed to document an ongoing Carnitor prescription. Respondent filed an answer on July 20, 2005 in which he denied all substantive allegations of the complaint.

The matter was referred to the Office of Administrative Law ("OAL"), where a hearing was held over the course of four days and an Initial Decision was rendered on May 18, 2009 by Administrative Law Judge ("ALJ") Patricia M. Kerins. Final disposition by the Board was scheduled for July 8, 2009. Exceptions were submitted on behalf of Dr. Sheth. The Attorney General did not submit

violations with respect to five other patients, but these allegations were abandoned by the Attorney General prior to commencement of the hearings before the Office of Administrative Law.

exceptions, but filed a letter brief on July 17, 2009 in reply to respondent's exceptions. At the hearing before the Board, the respondent was represented by counsel, Mr. Robert J. Conroy, Esq. Deputy Attorney General ("DAG") Shiobhan B. Krier represented the State.

After carefully reviewing the record in this case, weighing the arguments of counsel, and considering the well-reasoned Initial Decision of the ALJ, as attached, the Board incorporates herein and adopts in toto the findings of fact and conclusions of law of the ALJ as the Board's Final Decision, but modifies the penalty recommended by the ALJ utilizing our expertise as physicians and our discretion after reviewing the record in this matter.

The Board agrees in essence with the findings of fact of the ALJ. We find that during the eight year period from 1992 to 2000, respondent assumed the responsibility of treatment and management of J.S.'s rare and chronic metabolic disorder. Using our medical expertise we find that respondent deviated grossly from the standard of care in his treatment of J.S. by failing to conduct carnitine-level and liver-function tests on J.S. during the eight year span of treatment, and by failing to consult with or seek assistance from a specialist knowledgeable of the disorder. We affirm the ALJ's finding that respondent failed to refer J.S. for routine cardiac evaluation and failed to take basic steps to monitor and track the disorder, which could have alerted respondent

to any serious complications that may have arisen from J.S.'s CTD. Further, respondent maintained inadequate records relating to the treatment of J.S., especially regarding the dosage of Carnitor prescribed for J.S. This is evidenced by the fact that the amount of carnitine supplement that respondent prescribed could not be deciphered from respondent's records, and that after several years of maintaining the prescription, respondent stopped keeping track of the carnitine supplements altogether but nonetheless continued prescribing absent any documentation. The Board affirms the ALJ's finding that these actions placed J.S. at an increased risk of harm. Finally, we concur with the ALJ's conclusions of law that respondent's conduct constituted gross and repeated negligence in violation of N.J.S.A. 45:1-21(c) and failure to maintain appropriate records in violation of N.J.A.C. 13:35-6.5.

In reaching this determination, the Board considered respondent's claims in his exceptions, as well as the State's reply to those exceptions. Specifically, respondent claimed that: (I) the ALJ applied the wrong standard of care, the standard of care of a specialist and not that of a general pediatrician, to the respondent; (II) the ALJ erred in finding that the respondent's alleged failure to refer J.D. for routine cardiac evaluation and to monitor growth and development increased J.S.'s risk of harm; and (III) the ALJ erred in concluding that the opinions of respondent's

expert, Dr. Donner, were less cogent and less direct than those of the State's expert, Dr. Boodish.

The Board finds respondent's exceptions unpersuasive. The ALJ correctly relied upon the expert testimony of Dr. Wesley Boodish, M.D., who was qualified as an expert in pediatrics, as to the appropriate course of action that a general pediatrician should undertake in the circumstances present in this matter and found that respondent deviated from that standard. Specifically, respondent was aware that his patient had a rare disorder, but did not refer his patient to a specialist, did not perform basic tests or conduct basic monitoring relevant to such a disorder, and failed to keep track of prescriptions issued to the patient for the disorder. Respondent was not required to educate himself to the degree of a specialist on J.S.'s disorder, but in his capacity as J.S.'s general pediatrician respondent was responsible to recognize that J.S. required the care of a specialist, especially considering that Dr. Warren D. Grover, M.D., who was such a specialist, called J.S.'s CTD to respondent's attention in approximately 1989. Instead, respondent cavalierly continued to prescribe carnitine supplements at the dosage level originally recommended by Dr. Grover when J.S. was five years old without any reevaluation or reexamination by anyone knowledgeable about CTD for eight years until J.S.'s death at age thirteen. Having made no adjustments for J.S.'s age, weight gain, or growth for years, respondent summarily

concluded that nothing further was necessary because J.S. was "hardly sick." The Board agrees with the ALJ that respondent's failure to refer J.S. for routine cardiac evaluation and failure to adequately monitor J.S.'s growth and development increased J.S.'s risk of harm. Respondent was aware that J.S. had CTD and that the condition presented risks relating to J.S.'s cardiac health. Even if each individual potential harm that could have resulted from inadequately treated and unmonitored CTD was relatively small, the sum of potential harms was significant and included possibilities of ranging severity. By not referring J.S. for cardiac evaluation and by failing to monitor J.S.'s growth and development, respondent left J.S. exposed to the full panoply of risks that result from CTD. Further, frequent social interactions between respondent and J.S. did not constitute monitoring and did not substitute for an evaluation performed by a specialist.

The Board also agrees with the ALJ's conclusion that Dr. Boodish was a more credible expert. Dr. Boodish was qualified as an expert on pediatrics and his testimony relating to respondent's course of conduct as compared to a general pediatrician, not a specialist, was within the range of Dr. Boodish's expertise. In his testimony, Dr. Boodish relied on his education and experience, as well as his review of medical records, sworn statements made available to him, and medical authority. The ALJ is best suited to make credibility findings and we, relying on those findings and

drawing on our medical expertise find the ALJ's credibility determination sound in light of the evidence. Respondent failed to persuade the Board otherwise.

DISCUSSION ON PENALTY AND COSTS

Respondent's actions and inactions, as found in this matter, demonstrated gross and repeated acts of negligence, disregard for the statutes and regulations governing the practice of medicine, and violations of basic standards of care. After first learning of J.S.'s CTD and some of the risks involved from a specialist, respondent effectively disregarded J.S.'s CTD for approximately eight years culminating in J.S.'s sudden death. During that time, respondent had multiple opportunities to properly address J.S.'s CTD but fell glaringly short of providing his patient with the minimum level of care necessary to address the disorder. Instead, respondent merely continued mechanically prescribing carnitine supplements at the dosage initially recommended by a specialist for a young child without any subsequent evaluation or diagnosis, and without regard to the biological changes while J.S. aged eight years, from a five-year-old child to an adolescent of thirteen years. Respondent ultimately stopped recording J.S.'s carnitine supplement prescriptions and allowed the prescription, recommended for a five-year-old, to decrease as J.S. approached age thirteen. Respondent's explanation that he monitored his patient, a growing

child, by virtue of frequently seeing J.S. outside the office in social settings, coupled with Respondent's haphazard record keeping with regard to J.S., makes respondent's cavalier attitude towards the treatment of J.S. apparent and demonstrates a lack of appreciation for the gravity of this conduct.

The Board relies on the record, submissions of counsel, and its own expertise and medical judgment in modifying the penalty recommended by the ALJ. The ALJ recommended a three-month suspension of respondent's license, a civil penalty of \$20,000.00, and reimbursement of the costs and fees incurred by the State of New Jersey in investigating and prosecuting respondent. We determine that a one year suspension of respondent's license, stayed in its entirety, is appropriate in this case. A one year suspension is in line with the gravity and seriousness of respondent's misconduct. Its public nature will work to put future patients on notice of respondent's violations, and sends a strong message to respondent, the public, and medical professionals that the Board takes patient care and patient safety very seriously.

Under the circumstances in this case, the suspension is stayed in its entirety because it does not appear at this juncture that a disruption of respondent's practice is in the public's interest or that it would serve to protect the public, as the matter is an isolated incident, respondent is not likely to repeat this misconduct and in light of respondent's many years of exemplary

service, the corrective record keeping measures respondent voluntarily implemented, respondent's specialized ability to provide treatment for a portion of the population that is not fluent in English and may not otherwise have access to treatment, and respondent's demonstrated willingness to reeducate himself and update his procedures. This approach strikes the appropriate balance in that it is sufficiently punitive, acts as a deterrent to others, and addresses the need to provide notice to the public, enabling patients to make informed decisions when choosing a pediatrician. The Board further modifies the penalty recommended by the ALJ to require respondent to successfully complete a Board-approved record keeping course within six months of the filing of this Order. Reeducation and diligent efforts to maintain current competency in the field in which respondent practices, including all attendant obligations, serves to both protect the public and offer patients an adequate standard of care. We note that respondent acknowledges the need to upgrade his record keeping systems and that respondent has acted on his own accord, and prior to these proceedings, by beginning to use forms for patient information provided by the American Academy of Pediatrics.

During the proceeding before the Board, respondent offered extensive mitigation evidence in the form of approximately one hundred witnesses, both colleagues and patients, willing to testify in person at the hearing to respondent's competence,

professionalism, and positive contribution to his community. The Board is persuaded that the risk of recurrence of respondent's misconduct is low. We therefore amend the ALJ's recommendations on sanctions, penalties, and costs with the modifications indicated below.

Respondent objected to the amount and calculations utilized as a basis to impose costs and attorneys' fees. Specifically, respondent objected to the hourly rate charged for attorneys' fees and the actual time spent in preparing the case. We have reviewed the attorneys' fees sought in this matter and find the amount reasonable and consistent with the complexity of the prosecution of this matter. The Attorney General's certification in this matter extensively documented the time of the attorney expended in these proceedings, detailing all costs as of July 7, 2009. The Attorney General documented a total of \$45,895.50 in counsel fees incurred in the course of proceedings regarding respondent. The Attorney General did not include any fees for time expended after July 2, 2009 and did not include the time spent by DAG Sunil Raval, the DAG who initially filed the Complaint against respondent in 2005. The Attorney General's certification was supported by the time sheets of DAG Krier and included information derived from a memorandum dated June 16, 2005 from Nancy Kaplan, then Acting Director of the Department of Law and Public Safety, detailing the uniform rate of compensation for the purpose of recovery of attorneys' fees

established in 1999 and amended in 2005, and setting the hourly rate of a DAG with five to ten years of legal experience at \$155.00 per hour. The rate charged by the Division of Law of \$155.00 for a DAG with five to ten years of legal experience has been approved in prior litigated matters and appears to be well below the community standard. Moreover, we find the certification attached to the billings to be sufficient.

We find the application to be sufficiently detailed to permit our conclusion that the amount of time spent on each activity, and the overall fees sought are objectively reasonable. (See, Poritz v. Stang, 288 N.J. Super. 217 (App. Div. 1996)). We find the Attorney General has adequately documented the legal work necessary to advance the prosecution of this case. We are thus satisfied that the Attorney General's claims as to attorneys' fees are reasonable, especially when viewed in the context of the seriousness and scope of the action maintained against respondent. We note that respondent has provided no documentation of any inability to pay such costs.

As to the other costs sought, sufficient documentation has been submitted to support imposition of the following costs (including the attorneys' fees discussed above). We find the costs reasonable based on the documentation and detail provided and considering the seriousness of the action and specialized circumstances. Costs are traditionally imposed pursuant to

N.J.S.A. 45:1-25 so as not to pass the costs of the proceeding onto licensees who support Board activities through licensing fees.

Expert Witness Fees	\$ 4,550.00
Medical Board and OAL transcripts	2,405.65
Investigative costs	4,546.41
Attorneys' fees	<u>45,895.50</u>

Total Costs: \$ 57,397.56

THEREFORE, IT IS on this 24th day of December, 2009

ORDERED THAT:

1. The license of respondent Surendra Sheth, M.D. to practice medicine and surgery in the State of New Jersey is hereby suspended for a period of one year, effective upon filing of this order. The one year suspension is stayed in its entirety and is to be served as a period of probation.

2. Respondent shall enroll in and provide documentation to the Board of full attendance at and successful completion of, a Board approved record keeping course within six (6) months of the filing of this Order.

3. Respondent shall pay a civil penalty in the amount of \$20,000.00 within thirty (30) days of the date of service of this Order. Payment shall be by means of a certified check or money order, payable to the State of New Jersey and submitted to the Board at the above address. In the event that such payment is not

timely made, a certificate of debt may be filed and proceedings may be instituted for collection.

4. Respondent shall pay costs and attorneys' fees in the amount of \$57,397.56 within thirty (30) days of the date of the service of this Order. Payment shall be by means of a certified check or money order, payable to the State of New Jersey and submitted to the Board at the address above. In the event that such payment is not timely made, a certificate of debt may be filed and proceedings may be instituted for collection.

NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS

By: 

Paul C. Mendelowitz, M.D.
Board President

**DIRECTIVES APPLICABLE TO ANY MEDICAL BOARD LICENSEE
WHO IS DISCIPLINED OR WHOSE SURRENDER OF LICENSURE
HAS BEEN ACCEPTED**

APPROVED BY THE BOARD ON MAY 10, 2000

All licensees who are the subject of a disciplinary order of the Board are required to provide the information required on the addendum to these directives. The information provided will be maintained separately and will not be part of the public document filed with the Board. Failure to provide the information required may result in further disciplinary action for failing to cooperate with the Board, as required by N.J.A.C. 13:45C-1 et seq. Paragraphs 1 through 4 below shall apply when a license is suspended or revoked or permanently surrendered, with or without prejudice. Paragraph 5 applies to licensees who are the subject of an order which, while permitting continued practice, contains a probation or monitoring requirement.

1. Document Return and Agency Notification

The licensee shall promptly forward to the Board office at Post Office Box 183, 140 East Front Street, 2nd floor, Trenton, New Jersey 08625-0183, the original license, current biennial registration and, if applicable, the original CDS registration. In addition, if the licensee holds a Drug Enforcement Agency (DEA) registration, he or she shall promptly advise the DEA of the licensure action. (With respect to suspensions of a finite term, at the conclusion of the term, the licensee may contact the Board office for the return of the documents previously surrendered to the Board. In addition, at the conclusion of the term, the licensee should contact the DEA to advise of the resumption of practice and to ascertain the impact of that change upon his/her DEA registration.)

2. Practice Cessation

The licensee shall cease and desist from engaging in the practice of medicine in this State. This prohibition not only bars a licensee from rendering professional services, but also from providing an opinion as to professional practice or its application, or representing him/herself as being eligible to practice. (Although the licensee need not affirmatively advise patients or others of the revocation, suspension or surrender, the licensee must truthfully disclose his/her licensure status in response to inquiry.) The disciplined licensee is also prohibited from occupying, sharing or using office space in which another licensee provides health care services. The disciplined licensee may contract for, accept payment from another licensee for or rent at fair market value office premises and/or equipment. In no case may the disciplined licensee authorize, allow or condone the use of his/her provider number by any health care practice or any other licensee or health care provider. (In situations where the licensee has been suspended for less than one year, the licensee may accept payment from another professional who is using his/her office during the period that the licensee is suspended, for the payment of salaries for office staff employed at the time of the Board action.)

A licensee whose license has been revoked, suspended for one (1) year or more or permanently surrendered must remove signs and take affirmative action to stop advertisements by which his/her eligibility to practice is represented. The licensee must also take steps to remove his/her name from professional listings, telephone directories, professional stationery, or billings. If the licensee's name is utilized in a group practice title, it shall be deleted. Prescription pads bearing the licensee's name shall be destroyed. A destruction report form obtained from the Office of Drug Control (973-504-6558) must be filed. If no other licensee is providing services at the location, all medications must be removed and returned to the manufacturer, if possible, destroyed or safeguarded. (In situations where a license has been suspended for less than one year, prescription pads and medications need not be destroyed but must be secured in a locked place for safekeeping.)

3. Practice Income Prohibitions/Divestiture of Equity Interest in Professional Service Corporations and Limited Liability Companies

A licensee shall not charge, receive or share in any fee for professional services rendered by him/herself or others while barred from engaging in the professional practice. The licensee may be compensated for the reasonable value of services lawfully rendered and disbursements incurred on a patient's behalf prior to the effective date of the Board action.

A licensee who is a shareholder in a professional service corporation organized to engage in the professional practice, whose license is revoked, surrendered or suspended for a term of one (1) year or more shall be deemed to be disqualified from the practice within the meaning of the Professional Service Corporation Act. (N.J.S.A. 14A:17-11). A disqualified licensee shall divest him/herself of all financial interest in the professional service corporation pursuant to N.J.S.A. 14A:17-13(c). A licensee who is a member of a limited liability company organized pursuant to N.J.S.A. 42:1-44, shall divest him/herself of all financial interest. Such divestiture shall occur within 90 days following the the entry of the Order rendering the licensee disqualified to participate in the applicable form of ownership. Upon divestiture, a licensee shall forward to the Board a copy of documentation forwarded to the Secretary of State, Commercial Reporting Division, demonstrating that the interest has been terminated. If the licensee is the sole shareholder in a professional service corporation, the corporation must be dissolved within 90 days of the licensee's disqualification.

4. Medical Records

If, as a result of the Board's action, a practice is closed or transferred to another location, the licensee shall ensure that during the three (3) month period following the effective date of the disciplinary order, a message will be delivered to patients calling the former office premises, advising where records may be obtained. The message should inform patients of the names and telephone numbers of the licensee (or his/her attorney) assuming custody of the records. The same information shall also be disseminated by means of a notice to be published at least once per month for three (3) months in a newspaper of

general circulation in the geographic vicinity in which the practice was conducted. At the end of the three month period, the licensee shall file with the Board the name and telephone number of the contact person who will have access to medical records of former patients. Any change in that individual or his/her telephone number shall be promptly reported to the Board. When a patient or his/her representative requests a copy of his/her medical record or asks that record be forwarded to another health care provider, the licensee shall promptly provide the record without charge to the patient.

5. Probation/Monitoring Conditions

With respect to any licensee who is the subject of any Order imposing a probation or monitoring requirement or a stay of an active suspension, in whole or in part, which is conditioned upon compliance with a probation or monitoring requirement, the licensee shall fully cooperate with the Board and its designated representatives, including the Enforcement Bureau of the Division of Consumer Affairs, in ongoing monitoring of the licensee's status and practice. Such monitoring shall be at the expense of the disciplined practitioner.

(a) Monitoring of practice conditions may include, but is not limited to, inspection of the professional premises and equipment, and inspection and copying of patient records (confidentiality of patient identity shall be protected by the Board) to verify compliance with the Board Order and accepted standards of practice.

(b) Monitoring of status conditions for an impaired practitioner may include, but is not limited to, practitioner cooperation in providing releases permitting unrestricted access to records and other information to the extent permitted by law from any treatment facility, other treating practitioner, support group or other individual/facility involved in the education, treatment, monitoring or oversight of the practitioner, or maintained by a rehabilitation program for impaired practitioners. If bodily substance monitoring has been ordered, the practitioner shall fully cooperate by responding to a demand for breath, blood, urine or other sample in a timely manner and providing the designated sample.

NOTICE OF REPORTING PRACTICES OF BOARD
REGARDING DISCIPLINARY ACTIONS

Pursuant to N.J.S.A. 52:14B-3(3), all orders of the New Jersey State Board of Medical Examiners are available for public inspection. Should any inquiry be made concerning the status of a licensee, the inquirer will be informed of the existence of the order and a copy will be provided if requested. All evidentiary hearings, proceedings on motions or other applications which are conducted as public hearings and the record, including the transcript and documents marked in evidence, are available for public inspection, upon request.

Pursuant to 45 CFR Subtitle A 60.8, the Board is obligated to report to the National Practitioners Data Bank any action relating to a physician which is based on reasons relating to professional competence or professional conduct:

- (1) Which revokes or suspends (or otherwise restricts) a license,
- (2) Which censures, reprimands or places on probation,
- (3) Under which a license is surrendered.

Pursuant to 45 CFR Section 61.7, the Board is obligated to report to the Healthcare Integrity and Protection (HIP) Data Bank, any formal or official actions, such as revocation or suspension of a license (and the length of any such suspension), reprimand, censure or probation or any other loss of license or the right to apply for, or renew, a license of the provider, supplier, or practitioner, whether by operation of law, voluntary surrender, non-renewability, or otherwise, or any other negative action or finding by such Federal or State agency that is publicly available information.

Pursuant to N.J.S.A. 45:9-19.13, if the Board refuses to issue, suspends, revokes or otherwise places conditions on a license or permit, it is obligated to notify each licensed health care facility and health maintenance organization with which a licensee is affiliated and every other board licensee in this state with whom he or she is directly associated in private medical practice.

In accordance with an agreement with the Federation of State Medical Boards of the United States, a list of all disciplinary orders are provided to that organization on a monthly basis.

Within the month following entry of an order, a summary of the order will appear on the public agenda for the next monthly Board meeting and is forwarded to those members of the public requesting a copy. In addition, the same summary will appear in the minutes of that Board meeting, which are also made available to those requesting a copy.

Within the month following entry of an order, a summary of the order will appear in a Monthly Disciplinary Action Listing which is made available to those members of the public requesting a copy.

On a periodic basis the Board disseminates to its licensees a newsletter which includes a brief description of all of the orders entered by the Board.

From time to time, the Press Office of the Division of Consumer Affairs may issue releases including the summaries of the content of public orders.

Nothing herein is intended in any way to limit the Board, the Division or the Attorney General from disclosing any public document.